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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 404

THE PEOPLE OF THE STATE OF NEW YORK
UPON THE RELATION OF ANNIE COHN,
Appellant,

against

MARK GRAVES, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION ON APPEAL.

Pursuant to Supreme Court Rule 12, Par. 1, Annie Cohn, the above appellant, files this, her statement, showing the basis on which said appellant contends that the Supreme Court has appellate jurisdiction to review on appeal the judgment appealed from herein, as follows:

I. The statute believed to sustain appellate jurisdiction is the Act of Congress of February 13, 1925, Chap. 229,

Sec. 1, 43 Stat. 936, effective May 13, 1925, amending and re-enacting Sec. 237 (a) of the Judicial Code (U. S. Code Annotated, Title 28, Sec. 344) provides:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the Court from which it was removed by the writ."

The Act of Congress of January 31, 1928, Chap. 14, Sec. 1, 45 Stat. 54, (U. S. C. A., Title 28, Sec. 861a,) provides:

> "That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

The Act of Congress of April 26, 1928, Chap. 440, 45 Stat. 466, amending Sec. 2 of the Act of Congress of January 31, 1928, hereinbefore cited, provide:

> "SEC. 2. The Statutes regulating the right to a writ of error defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

The Statute of the State, the Validity of Which is Involved.

II. The Statute of the State, the validity of which is involved in this case is Sec. 359 of the Tax Law of the State of New York, as amended by Chap. 933, Laws of 1935, page 1768, in so far as it imposes an income tax upon rents and income received by a resident of this State from real and personal property located and having a situs in a foreign State. Said Statute reads as follows:

SEC. 359. GROSS INCOME DEFINED.—"Includes gains, profits and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales or dealings in property, whether real or personal, *and whether situated within or without the state,* growing out of the ownership or use of or interest in such property; also from interest, rent (*including rent derived from real property situated outside the state*), dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, including gains or profits or income derived through estates or trusts by the beneficiaries thereof, whether as distributed or as distributable shares, *it being intended to include all the foregoing items, without regard to the source thereof, location of the property involved, or any other factor, except only a case where the inclusion thereof would be violative of constitutional restrictions.* The amount of all items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the methods of accounting permitted in this article, any such amounts are to be properly accounted for as of a different period; but,

SEC. 2. *This act shall be retroactive to January first, nineteen hundred nineteen.*

SEC. 3. "This act shall take effect immediately." (May 16, 1935.)

The matter in italics is new and was comprised in the Amendment of 1935, and is challenged in the instant case.

The following section, as amended by Chap. 35, Laws of 1935, page 395, (February 16, 1935) of the Tax Law of the State of New York is involved in the determination of the validity of the challenged statute:

> SEC. 351. IMPOSITION OF INCOME TAX.—"A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: * * *
>
> "A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state."

Date of Judgment and Order Sought to be Reviewed and Date of Application for Appeal.

III. The order and judgment of the Supreme Court of the State of New York, Albany County, sought to be reviewed herein were entered July 14, 1936, and August 18, 1936, upon the remittitur and the decision of the Court of Appeals of the State of New York, handed down July 8, 1936. On September 2, 1936, a petition for allowance of appeal to the Supreme Court of the United States was presented to Honorable Frederick E. Crane, Chief Judge of the Court of Appeals.

Nature of the Case, Basis of Jurisdiction, and Grounds Upon Which it is Contended the Questions Involved are Substantial.

IV. Annie Cohn, the appellant, during the years 1931 and 1932, while a resident of the State of New York, received

(or had credited to her account in New Jersey) as the beneficiary of a life estate created by the Will of her deceased husband, certain income, part of which was derived from rents from real estate located in the State of New Jersey, and part from interest on bonds and mortgages upon real property located in that State. There were three executors of the will (which had been probated in Passaic County, State of New Jersey in 1913) two of whom resided in New Jersey and appellant who resided in this State. The executors qualified in the State of New Jersey. Since 1913, they have been functioning in that State, and the office of the estate is, and always has been, in the City of Paterson, N. J., where the said securities were kept in a bank. The executors in New Jersey, acting as the agents of the life tenant, the said appellant, collected the rents, the interest and amortization payments on the bonds and mortgages, made re-investments and managed the property entirely in New Jersey.

The appellant filed New York State Income Tax Returns for the years 1931 and 1932, showing income received from the said Estate (or credited to her account) consisting of rents from certain specified real properties located in New Jersey and interest on mortgages covering real property in the State of New Jersey and having a situs in that State. Appellant paid income taxes on such income for the years 1931 and 1932. Thereafter she made application for refund of the taxes paid, as erroneously paid or illegally collected, her contention being that the State of New York was without power to tax either the rental income derived from real property located without the State, or the income from bonds and mortgages located without the State, where the situs of such intangibles was likewise without the State. Nor application for refunds was duly made in accordance with the law of said State, and in her application for refunds appellant relied upon the case of *Pierson* v. *Lynch*

(237 App. Div. 763, Aff'd, 263 N. Y. 533; writ of certiorari dismissed as improvidently granted, 293 U. S. 52).

The Legislature amended the Tax Law, May 16, 1935, (Cons. Laws, Chap. 60) by chapter 933 of the Laws of 1935, page 1768, and provided that the rental income derived by a resident of New York State from real property located without the State, and income from personal property with a situs outside of as well as within the State, constituted taxable income. The law was made retroactive to January 1, 1919.

The appellant's claims for refund were denied by the State Tax Commission, the appellees herein. A certiorari proceeding was thereupon instituted in the Supreme Court of the State of New York, Albany County, returnable before the Appellate Division, Third Department. Said Court (by a divided Court) decided that the identical question presented had been decided in matter of *Pierson* v. *Lynch* (*supra*); that the fact that the statute which authorized the tax, Sec. 359 of the Tax Law, had been amended since the decision in the *Pierson* case was without significance, as that case was decided solely upon the ground that under the Fourteenth Amendment to the Federal Constitution it was not within the power of a State to tax a resident of the State on account of rentals or income received from land located beyond its borders. A copy of the opinion is appended hereto. Reference was made by the Court to the determination of the Supreme Court of the United States in *Senior* v. *Braden* (295 U. S. 422).

Upon an appeal by the State Tax Commission, the appellee herein, the Court of Appeals of the State of New York, by a divided Court, rendered the following decision:

CRANE, *Ch. J.*:

"Rents from real property located in New Jersey, as well as interest from mortgages, on similar property,

is, in my opinion, taxable income when received by a resident of this state. The tax upon such income is not a tax on the New Jersey real estate. The Pollock case (Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429) has not decided otherwise and should not be pushed to cover this point. Many cases have gone through the courts since that decision explaining and clarifying its limitations. What may be a "direct" tax under the Federal Constitution may be income (as it really is) for other purposes.

"The order of the Appellate Division should be reversed and the determination of the State Tax Commission affirmed, with costs in this court and in the Appellate Division. * * *"

The prevailing and dissenting opinions of the Court of Appeals are reported in 271 N. Y. 353; a copy thereof is appended hereto.

The Federal questions sought to be reviewed were first raised in the petition for writ of certiorari in the New York Supreme Court, Albany County (Orig. Record on Appeal, page 5). The petitioner, the appellant herein, averred in said petition that the determination of the State Tax Commission was erroneous and that the income taxes paid by her for the years 1931 and 1932 were erroneously and illegally collected; and that she was injured and aggrieved thereby on the ground that her income was from rents and mortgage interest from real estate situated in the State of New Jersey; and that such income was not legally taxable by the State of New York, and that said tax would be, in substance and effect, a tax upon real estate and tangible property situated outside the State of New York and would violate petitioner's rights under the Constitution of the United States and the Fourteenth Amendment thereof.

The validity of a law of the State of New York was formally drawn in question and the same was sustained by

the highest court of the State in which the decision in the suit could be had. The questions involved are substantial in that the legal power of one sovereign State to reach out and tax property having a situs beyond its borders in another sovereign State is involved; likewise the question of multiple State taxation; and also the right of a State to arbitrarily make a tax law retroactive for a period of over fifteen years. Appellant was injuriously affected thereby as her claims for refunds for the years 1931 and 1932, to which she was legally entitled under the existing law, were denied.

That the questions involved are substantial is manifest from the last two paragraphs of the dissenting opinion of Hubbs, J., in this case, in the Court of Appeals:

> "While there has been a sharp conflict among the members of the United States Supreme Court on the subject and its earlier decisions are, in certain instances, in conflict with its later decisions, still we understand the late decisions to mean that double taxation is illegal and that the income from securities which have a taxable situs in one State cannot be legally taxed in another State. The decisions of that court are binding upon us on the questions here involved and should be strictly followed.
>
> "As the property from which the relator's income was derived had a business situs in New Jersey and was taxable there, the income therefrom cannot be taxed in this State. The order of the Appellate Division should be affirmed, with costs."

The opinion of the Court of Appeals stated that a question under the Federal Constitution was presented and necessarily passed upon by said court, to wit:

> "Is section 359 of the Tax Law of the State of New York, as amended by Chapter 933, Laws of 1935,

in so far as it imposed an income tax upon rents received by a resident of this State from real property located in a foreign State repugnant to, and violative of, any provision of the Constitution of the United States. This Court held the sections of said Tax Law herein involved to be a valid exercise of legislative power."

Cases Believed to Sustain Jurisdiction.

V. Many cases could be cited by appellant to sustain the jurisdiction of this Court to review the final decision of the Court of Appeals in this cause. At the very outset, appellant invoked the guaranties given her by the Fourteenth Amendment to the Constitution of the United States. A substantial Federal question was presented and its decision was essential to the determination of the controversy and it was actually decided by the Court of Appeals of the State of New York adversely to the appellant.

The following cases in this Court are a few of the many which could be cited as sustaining the jurisdiction of this Court in this cause:

Miedreich v. *Lauenstein*, 232 U. S. 236 (1914);
Ward v. *Krinsky*, 259 U. S. 503, 510;
Blodgett v. *Silberman*, 277 U. S. 1 (1928);
Farmers' Loan & Trust Co. v. *Minn.*, 280 U. S. 204;
Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83;
Baldwin v. *Missouri*, 281 U. S. 586;
Beidler v. *South Carolina Tax Comm.*, 282 U. S. 1;
First Nat'l Bank v. *Maine*, 284 U. S. 312;
New Orleans v. *Stempel*, 175 U. S. 309;
Colgate v. *Harvey*, 296 U. S. 404;
Senior v. *Braden*, 295 U. S. 422;
Wheeling Steel Corp. v. *Fox*, United States Supreme Court, No. 663, October Term, 1935, decided May 18, 1936. (Not officially reported.)

By reason of the foregoing, it is respectfully submitted this this Honorable Court has jurisdiction of this appeal by virtue of Sec. 237a of the Judicial Code.

Dated September 2nd, 1936.

Respectfully submitted,

DAVID COHN,
MAURICE COHN,
Counsel for Appellant.

RANDOLPH E. PAUL, ESQ.,
WATSON WASHBURN, ESQ.,
Of Counsel.

COURT OF APPEALS.

THE PEOPLE OF THE STATE OF NEW YORK *upon the Relation of* ANNIE COHN, *Relator-Respondent*,

against

MARK GRAVES, JOHN J. MERRILL, JOHN P. HENNESSEY, *as Commissioners Constituting the State Tax Commission of the State of New York, Respondents-Appellants.*

CRANE, *Ch. J.*:

Rents from real property located in New Jersey, as well as interest from mortgages on similar property is, in my opinion, taxable income when received by a resident of this State. The tax upon such income is not a tax on the New Jersey real estate. The Pollock case (Pollock *v.* Farmers' Loan and Trust Co., 157 U. S. 429) has not decided otherwise and should not be pushed to cover this point. Many cases have gone through the courts since that decision explaining and clarifying its limitations. What may be a "direct" tax under the Federal Constitution may be income (as it really is) for other purposes.

The order of the Appellate Division should be reversed and the determination of the State Tax Commission affirmed, with costs in this Court and in the Appellate Division. A question under the Federal Constitution was presented and necessarily passed upon by this Court, viz.: Is section 359 of the Tax Law of the State of New York, as amended by chapter 933, Laws of 1935, in so far as it imposes an income tax upon rents received by a resident of this State from real property located in a foreign State repugnant to, and violative of any provision of the Constitution of the United States. This Court held the sections of said Tax Law herein involved to be a valid exercise of legislative power.

HUBBS, *J.* (dissenting):

The relator, Annie Cohn, during the years 1931 and 1932, while a resident of this State, received, as the beneficiary of a life estate created by the will of her deceased

husband, certain income, part of which was derived from rents from real estate located in the State of New Jersey and part from interest on bonds and mortgages upon real property located in that State. There were three executors of the will, two of whom resided in New Jersey and relator who resided in this State. The executors qualified in the State of New Jersey. Since 1913 they have been functioning in that State and the office of the state is and always has been in the City of Paterson, where the securities are kept in a bank. The executors have managed the estate property, collected rents and income from bonds and mortgages, and made repairs to the real property.

The relator filed a State income tax return showing income received from the estate, consisting of rents from certain specified real properties located in New Jersey and interest on mortgages covering real property in that State. She paid an income tax on such income. Thereafter she made application for refund of the taxes paid, as erroneously paid or illegally collected, her contention being that this State was without power to tax either the rental income derived from real property located without the State or the income from bonds and mortgages upon real property located without the State, where the situs of such intangibles was likewise without the State. In making the application for refund, the appellant relied upon Matter of Pierson *v.* Lynch (237 App. Div., 763; affd. 263 N. Y. 533). The appeal in that case was dismissed by the United States Supreme Court.

The Legislature amended the Tax Law (Cons. Laws, ch. 60) by chapter 933 of the Laws of 1935, and provided that the rental income derived by a resident of New York State from real property located without the State constituted taxable income. The law was made retroactive to January 1, 1919.

The relator's claims for refund were denied. This proceeding was thereupon instituted. The Appellate Division decided that the identical question presented had been decided in Matter of Pierson *v.* Lynch (supra); that the fact that the statute which authorized the tax, Section 359 of the Tax Law, has been amended since the decision

in the Pierson case is without significance as that case was decided solely upon the ground that under the Fourteenth Amendment to the Federal Constitution it was not within the power of a State to tax a resident of the State on account of rentals or income received from land located beyond its borders. Reference was also made to the determination of the Supreme Court of the United States in Senior *v.* Braden (295 U. S. 422).

Upon this appeal the State Tax Commission contends, despite the determination of this court in the Pierson case and despite the decision of the United States Supreme Court in Pollock *v.* Farmers' Loan & Trust Co. (157 U. S. 429), which latter case held in effect that a tax upon the income from real property was the same in substance as a tax on the real property, that the rents and mortgage interest derived from real property located without the State received by a resident of this State are properly subject to the New York personal income tax law.

It would be impossible, without squarely receding from the position taken in the Pierson case, to hold that income represented by rentals from real property located in another State may be included as part of the owner's income for the purpose of computing the owner's income tax in this State. We believe that case was correctly decided. The only difference in the facts of the two cases is that in the Pierson case title to the real property appears to have been in the recipient of the income in her individual name, whereas in the present case the recipient of the income had only a life interest in the property. This slight difference in the facts of the two cases is not urged as a ground for the application of a different rule and, of course, could not be urged as such a ground, since the question involved is based upon the broad ground of whether the income tax is such a tax as may not be imposed by one State upon real real property and tangible personal property located in another. The argument of the Tax Commission is, in substance, that the decision in Matter of Pierson *v.* Lynch (supra) was based upon the decision of the Supreme Court of the United States in the Pollock case and that, as a matter of fact, the decision in

the Pollock case has no bearing upon the point at issue here. The tax involved in the Pollock case was an annual tax levied by the Congress of the United States on the income of persons and corporations. It was decided that a tax on the rents or income of real estate is a direct tax within the meaning of the Constitution of the United States which, by the third clause of Section 2, Article I, requires that direct taxes shall be apportioned among the several States and that since the income tax law under consideration did not provide apportionment of the tax collected and the tax was a direct tax, the act was in violation of the United States Constitution and to the extent that it levied a tax on the rents or income of real estate was invalid. The determination in the Pollock case has been repeatedly stated to have amounted to a holding upon the constitutional meaning of the word "direct"—that is, that a tax on income from real property amounts in effect to a direct tax upon the property (Knowlton *v.* Moore, 178 U. S. 41; Flint *v.* Stone Tracy Co., 220 U. S. 107; McCoach *v.* Minehill R'y, 228 U. S. 295).

In the Pollock case the question involved was as to the validity of the act of Congress as construed in the light of the Federal Constitution, whereas in the instant case we are concerned with the effect of a tax imposed by the State in view of the provision of the Federal Constitution. There seems to be nothing in the late decisions of the United States Supreme Court which detracts from the effect of its decision in the Pollock case that a tax upon the income from real property is a direct tax and equivalent to a tax upon the property itself.

In Senior *v.* Braden, (*supra*) the State of Ohio taxed transferable certificates under declarations of trust entitling the holders to a portion of rents from specific parcels of real estate, some within the State of Ohio, some in other states. It was conceded that under the Fourteenth Amendment the States had no power to tax land or interests in land beyond its borders, and that if the certificates constituted interests in land, the tax would be unconstitutional and void. It was decided that a tax in Ohio on the certificates was void. It appeared that each parcel of land cov-

ered by the certificates was taxed in the State where located. In each the trustee held and managed the property for the use and benefit of the certificate holders and distributed the rents and proceeds of sales. Each certificate holder was said to hold a beneficial interest in the trust of each parcel, and the trustee was free from the control of the certificate holders. The State contended that the interest of a certificate holder was a species of intangible personal property entitling the holder to a *pro rata* distribution of income and proceeds of sales; that the certificate was the evidence of the holder's interest in land, legal title of which the trustee held. The court held the certificate holders had interests in and to the property which were more than a bare right and much more than a choice in action, citing and quoting from Brown *v.* Fletcher (235 U. S., 589). The dissenting opinion of Mr. Justice Stone indicates that he understood the prevailing opinion to hold that a State could not tax the income from real property located in another State. The court decided that the same rule applied under the State statute as under the United States statute, thereby extending the rule of the Pollock case and making it applicable under a State statute. Although that case did not involve an income tax statute, it did involve a tax under the investments measured by the income.

As land in another State cannot be taxed against the owner in this State, and a tax upon the income from real property is a tax upon the real property itself, it follows that the tax assessed in the case at bar on the rents received was illegal. It was also illegal as constituting double taxation for the reasons hereinafter stated.

There remains the question as to whether the income from bonds and mortgages is likewise entitled to be exempted from the application of the State income tax. In considering that question, it is to be borne in mind that the property upon which the mortgages exist is wholly without the State of New York, and, further, that the evidences of the indebtedness, that is, the bonds and mortgages, are likewise without the State. Furthermore, they are a part of an estate administered by the executors in a measure as

a business in the State of New Jersey. The income results from the investment of funds of the estate, the supervision of those investments, and the activity of the executors in collecting the income. The court below seems to have treated the income from mortgages on the real property under the same category as rentals. That type of income was not involved in Matter of Pierson *v.* Lynch (*supra*). Mortgage interest is not compensation for the use of real property but rather compensation for the use of money. That is, it constitutes compensation for a loan of money or forbearance on an indebtedness. The debt is not tangible and the mortgage upon the real property is only collateral security for the intangible. If it were necessary to construe the decision in this case as a determination that a tax upon mortgage interest is a direct tax on the land, there would be difficulty in sustaining the decision in so far as that type of income is concerned. However, the courts have gone much further and have held that where intangible as well as tangible property has acquired a business situs in another State, taxation thereof by the State other than the State in which it had acquired a business situs would violate the due process clause of the Fourteenth Amendment of the United States Constitution and constitute double taxation. In New Orleans *v.* Stempel, (175 U. S. 309) the defendant in error, domiciled in New York, was the owner of credits evidenced by notes largely secured by mortgages on real property in New Orleans. The notes and mortgages were in the City of New Orleans in the possession of an agent of the defendant in error. The agent collected the interest and principal as it became due and deposited the same in a bank in New Orleans. The question involved in that case was as to whether the property in the hands of the agent was subject to taxation in New Orleans. It was held that such taxation did not infringe any rights secured by the Federal Constitution. It was said that when an indebtedness has taken a concrete form and become evidenced by note, bill, mortgage or other written instrument, and the written instrument evidencing the indebtedness is left within the State in the hands of an agent of the non-resident owner to be by the agent used for

the collection and deposit or reinvestment within the State, its taxable situs is in the State (De Ganay *v.* Lederer, 250 U. S. 376).

It seems to be quite clear that property, consisting of bonds, mortgages and similar evidences of indebtedness, is taxable in the State where they are physically located if they are there, as in this case, for the purpose of collection of principal and interest and for management by an agent within the State. For the purpose of taxation, the intangible debt, when represented by something of a concrete nature such as a bond or mortgage, becomes in the nature of a tangible item of property at the business situs (De Ganay *v.* Lederer, *supra;* Hill *v.* Carter, 47 Fed. Rep. (2d) 869; Opinion of the Justices, 84 N. H. 559; Harrison *v.* Commissioner of Corporations and Taxations, 272 Mass. 422).

The same principle applies to tangible personal property. (Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194; Frick *v.* Pennsylvania, 268 U. S. 473; see, also, Senior *v.* Braden, supra).

Maguire *v.* Trefry (253 U. S. 12) was at one time direct authority for holding that the income from the bonds and mortgages on real property situate in New Jersey is taxable in this State. The United States Supreme Court has, however, departed from the rule stated in that case. (Farmers' Loan & Trust Co. *v.* Minnesota, 280 U. S. 204).

In Senior *v.* Braden (*supra,* p. 432) the court said that the views expressed in the Maguire case "are not in harmony with Safe Deposit & Trust Co. *v.* Virginia, 280 U. S., 83, and views now accepted here in respect of double taxation."

If the decision in the Maguire case is in conflict with the present views of the United States Supreme Court, it necessarily follows that under the decision of that court, the income from the New Jersey bonds and mortgages is not subject to the payment of an income tax in this State. In the case of Union R. T. Co. *v.* Kentucky (*supra*) it was definitely decided that a State could not tax tangible property permanently situated outside of the State or domicile of the owner and used there in the owner's business.

Later the court extended the principle to intangibles in order to eliminate unjust double taxation, stating in effect that it is no more possible for an intangible to have a legal status in two places at the same time than it was possible for a tangible to be in two places at the same time (First Nat. Bank *v.* Maine, 284 U. S. 312; Baldwin *v.* Missouri, 281 U. S. 586; Safe Deposit & Trust Co. *v.* Virginia, 280 U. S. 83).

While there has been a sharp conflict among the members of the United States Supreme Court on the subject, and its earlier decisions are, in certain instances, in conflict with its later decisions, still we understand the late decisions to mean that double taxation is illegal and that the income from securities which have a taxable situs in one State cannot be legally taxed in another State. The decisions of that court are binding upon us on the questions here involved and should be strictly followed.

As the property from which the relator's income was derived had a business situs in New Jersey and was taxable there, the income therefrom cannot be taxed in this State. The order of the Appellate Division should be affirmed, with costs.

Lehman, Crouch and Finch, JJ., concur with Crane, Ch. J.; Hubbs, J., dissents in opinion, in which O'Brien and Loughran, JJ., concur.

Order granted.

SUPREME COURT, APPELLATE DIVISION—THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK *upon the Relation* OF ANNIE COHN, *Relator*;

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, *as Commissioners Constituting the State Tax Commission of the State of New York, Respondents.*

HILL, P. J.:

The State Tax Commission has assessed an income tax against the relator, a resident of New York State, on account of rentals and income which she received from real property situate in New Jersey. A petition for a refund made as prescribed in the Tax Law has been denied by the Commission. That determination comes before our court for review under a writ of certiorari. The identical question now presented has been decided in this court, and adversely to the Commission's determination. (Matter of Pierson *v.* Lynch, 237 App. Div. 763; affd. without opinion, 263 N. Y. 533; writ of certiorari dismissed as improvidently granted, 293 U. S. 52.)

The fact that the statute which authorized the tax (Tax Law, Sec. 359) has been amended since the decision in the Pierson case is without significance, as we decided that case solely upon the ground that under the Fourteenth Amendment to the Federal Constitution it was not within the power of a State, irrespective of the wording of the statute, to tax a resident of the State on account of rentals or income received from land located beyond its borders. The 1935 amendment (Laws of 1935, chap. 933) only makes more definite and certain the meaning which we gave section 359 in deciding the Pierson case, and does not detract from the force of that authority.

Further citation of authority may be cumulative, as the Pierson case is a direct authority, decided first in this court and unanimously affirmed without opinion in the Court of Appeals. However, as the Supreme Court of the United States in a later case has reapplied the law as it had been settled earlier, and as it was applied in the Pierson case, a brief examination of the more recent case (Senior *v.*

Braden, 295 U. S. 422) may be proper. There "The Ohio General Code provided that all investments and other intangible property of persons residing within the State should be subject to taxation" (p. 427). "Appellant owned transferable certificates showing that he was beneficiary under seven separate declarations of trust, and entitled to stated portions of rents derived from specified parcels of land—some within Ohio, some without" (p. 428). The taxing officials threatened to assess the income which the appellant received upon these declarations of trust. He instituted a suit to restrain the collection of the tax upon the ground that the Ohio statute was unconstitutional under the Fourteenth Amendment. The opinion states: "With commendable frankness counsel admit that under the Fourteenth Amendment the State has 'no power to tax land or interests in land situate beyond its borders;' * * *. Consequently, they say, 'if the property of appellant, which the appellees seek to tax in this case, is land or interest in land situate * * * without the State, their action is unconstitutional and should be permanently enjoined.'"

In the Senior case there were three parcels of land outside Ohio to which separate declarations of trust applied. The attorney for the Ohio taxing officials recognized, as it was recognized by us in the Pierson case, that the law was settled, and conceded, inter alia, that the State had no power to tax land or interests in land situate beyond its borders. The court applied that rule. The opinion quite largely dealt with the subject of whether the land trust certificates were interests in land. It was determined that they were, and the court restrained the enforcement of the tax upon the ground that the State had no power to tax land or interest in land situate beyond its borders, and that a tax upon the income from land was tantamount to a tax upon the land.

The determination should be annulled, with fifty dollars costs and disbursements.

Crapser, Bliss and Heffernan, JJ., concur; Rhodes, J., dissents and votes to confirm.

Determination annulled, with fifty dollars costs and disbursements.